In the Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 523

THE UNITED STATES OF AMERICA, *Plaintiff in Error,*

v.

BOZE YUGINOVICH AND COUSIN BOZE YUGINOVICH.

BRIEF AMICUS CURIAE

On Behalf of Plaintiff in Error.

Agreeable to the permission of the court, this brief is filed to aid in reaching a correct conclusion on the principles of law involved herein.

STATEMENT

This brief is submitted to support the following propositions of law, which are determinative in this case.

Federal and State liquor tax and revenue laws are not repealed by the National Prohibition Act.

Failure to comply with the revenue laws, Sections 3257, 3279, 3281, 3282 et seq., is an indictable offense.

FEDERAL AND STATE LIQUOR TAX AND REVENUE LAWS ARE NOT REPEALED BY THE NATIONAL PROHIBITION ACT.

Section 35 of the Federal Prohibition Code provides as follows:

> "This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacturer or traffic of such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax penalty shall give no right to engage in the manufacture or sale of such liquor or relieve anyone from criminal liability, civil or criminal, heretofore or hereafter incurred under existing laws."

In addition, section 35 of the Prohibition Act provides:

> "All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws.

It is further provided in section 9, title 3, of the National Prohibition Act, that the manufacturers of Industrial Alcohol shall be exempt from certain sections of the Internal Revenue Laws, which apply to the making of distilled and vinous liquors. It is manifest from this section that Congress intended that all those who make intoxicating liquor, except Industrial Alcohol, must comply with the regulations in section 9, and all other regulations in the revenue laws. It follows that these laws which must be

complied with are in full force and effect. The only section which could affect this case, even if the defendant was an Industrial Alcohol manufacturer would be section 3279. The manufacturers of Industrial Alcohol must comply with the other sections, 3257, 3281 and 3282, R. S., for which the defendants in this case are indicted for violating the Internal Revenue Laws.

The above sections of the law make clear that Congress intended to retain all of the Revenue Laws and Regulations providing for the manufacture and traffic in intoxicating liquor. Unless Congress did not have authority to enact such provisions the conclusions reached by the district judge are clearly erroneous.

The Court below said, with reference to the Prohibition Act:

"It is intended, as I take it, to cover the entire subject, and in my judgment supersedes and operates as a repeal of the previous act governing the operation of distilleries."

"That it (The National Prohibition Act) is inconsistent with the Revenue Act which provides for the levying of a tax upon distillers and upon the liquor manufacturer at such places."

In other words, the District Judge holds that the Revenue Laws and Regulations are abrogated by the National Prohibition Act. * * *

It has been contended in practically all of these cases relating to the validity of section 35 of the National Prohibition Act, that a law imposing a tax upon the outlawed liquor traffic is void, because the entire beverage liquor traffic is prohibited by the Eighteenth Amendment. This contention is not sound. The courts have uniformly sustained laws levying a tax upon the liquor traffic, even though it is conducted in violation of law.

POWER OF STATE AND FEDERAL GOVERNMENT ON TAXATION

The sovereignty of a State or Nation is said to extend to everything which exists by its own authority, or is introduced by its permission and to be limited accordingly, so that everything over which such sovereign power extends is an object of taxation. Cyc. Vol. 37, Pg. 716.

The power of taxation rests upon necessity, and is an essential and inherent attribute of sovereignty. It is as extensive as the range of subjects over which the power of that Government extends. As to such subjects, and in the absence of constitutional restrictions the power of taxation is practically absolute and unlimited, the only security against an abuse of the power of being found in the structure of the Government itself. Cyc. 37, Pg. 716.

The power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and *thus only* it reaches every subject, and may be exercised at discretion. *License Tax Cases* (5 Wall 462.)

TAXES FOR OTHER PURPOSES THAN RAISING REVENUE ONLY, SUSTAINED

In Veazie Bank v. Fenno, 8 Wall, 533, the court sustained a prohibitive and special tax laid on the notes of State banks for the purpose (as well known) of driving them out of circulation. In sustaining its constitutionality this court said (8 Wall 548):

> "It is insisted, however, that the tax in the case before us is so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the

bank, and is therefore beyond the constitutional power of Congress."

"The first answer to this is that the judicial can not prescribe to the legislative departments of the Government limitations upon the exercise of its acknowledged powers. The power of tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."

In McCray v. United States, 195, U. S., 27, the later act levying a higher tax on oleomargarine was sustained over a very strong showing that it was intended merely to suppress the production of and dealing in oleomargarine and was therefore an interference with the reserved police powers of the states. The reason given by the court was as follows: (195 U. S. 63, 64.)

"As we have said, it has been conclusively settled by this court that the tendency of that article to deceive the public into buying it for butter is such that the state may, in the exertion of their police powers, without violating the due process clause of the 14th Amendment, absolutely prohibit the manufacture of the article. It hence results, that, even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it cannot be said that such repression destroys rights which no free government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction. And the same considerations dispose of the contention based upon the due process clause of the 5th Amendment. That provision, as we previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution.

> From this it follows, as we have also previously declared, that the judiciary is without authority to avoid an act of Congress exerting the taxing power, even in a case where, to the judicial mind, * it seems that Congress had, in putting such power in motion, abused its lawful authority by levying tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress."

Finally, in United States v. Jin Fuey Roy, 241 U. S. 394 (same case decided again by Sup. Ct., December 6, 1920. Question of constitutionality "set at rest" says the court). This court said of the act under consideration:

> "It may be assumed that the statute has a moral end as well as revenue in view, but we are of the opinion that the district court, in treating these ends as to be reached only through a revenue measure within the limits of a revenue measure, was right." See also U. S. v. Doremus (249 U. S., 86.)

In the case of Youngblood v. Sexton, (32 Michigan, 406) a case involving the right of the State to tax the illegal traffic in liquors, the court used this convincing language:

> "It is enough for him that the government has selected for itself its own subjects for taxation, and prescribed its own rules. It is his liability to taxation at the will of the government that entitles him to protection, and not the circumstances of his being actually taxed. And the taxation of a thing may be, and often is when police purposes are had in view, a means of expressing disapproval instead of approbation of what is taxed.
>
> "There has undoubtly been felt and expressed a strong sentimental objection to the doing of anything by the State that even seemed to be a lending of its countenance to a business which the objectors

regarded as an evil in itself; especially to the State participating in the profits of a pernicious trade. But the objection never found expression in laws forbidding the taxation of liquors or of the business of dealing in them. Indeed, in this State liquors have always been taxable as property; and so have been the implements by means of which forbidden games of chance have been carried on. Yet when the keeper of billiard tables is compelled to pay a tax, it can be no defense to him, either in law or in morals, that he is compelled to do so from the profits of an illegal business. To refuse to receive the tax under such circumstances would tend to encourage the business, instead of restraining it; and would not only be unwise because it would tend to defeat the State policy which forbids games of chance and hazard.

"This State has never shown any disinclination to make things morally and legally wrong contribute to the public revenue when justice and good morals seemed to require it. If it were to act upon the idea of refusing to derive a revenue from such sources, it ought to decline to receive fines for criminal offenses with the same emphasis that it would refuse to collect a tax from an obnoxious business. If the tax is laid by way of discouragement or regulation, it has the same general object in view with the fine; not only as it affects the person taxed and the community, but also in the use to which the money is devoted. * * * "

In the case of Home Ins. Co. v. Augusta, 50 Ga. 530, the court held:

"The Federal laws give us illustration of the taxation of illegal traffic. A case in point was the taxation of the liquor traffic in this State previous to the repeal of the prohibitory law: the Federal law found a business in existence and it taxed it without undertaking to give it any protection whatever. McGuire v. Com., 3 Wall 387; Pervear v. Com., 5 Wall 475. *What would have prevented the State from taxing the same traffic at the same time? Is it any*

more restricted in the selection of subjects of taxation than the general government is? If one may tax and at the same time refuse to protect may not the other do the same? The only reason suggested for a negative reply to these questions is, that it was the State itself, not the United States, that made the business illegal, and it would be inconsistent and absurb to declare it illegal, and at the same time tax it. But how the inconsistency would appear in one case rather than the other is not apparent. The illegality was declared by competent authority, and yet the Federal Government taxed the trade, at the same time refusing, or being unable to protect it. If protection because of the tax was due to the very thing upon which the tax imposed, there would be an inconsistency in taxing a prohibited trade; but treating taxation, however and wherever it may fall, as the return for the general benefits of government—for the protection of life, liberty, the social and family relations, as well as to business and property—which is the only legal and proper idea of taxation, there is no inconsistency whatever in making a thing which is not protected by one of the measures or standards by which to determnie how much the party owning or supporting it ought to pay the government. IF ONE PUTS THE GOVERNMENT TO SPECIAL INCONVENIENCE AND COST BY KEEPING UP A PROHIBITED TRAFFIC OR MAINTAINING A NUISANCE, THE FACT IS A REASON FOR DISCRIMINATING IN TAXATION AGAINST HIM; AND IF THE TAX IS IMPOSED ON THE THING WHICH IS PROHIBITED OR WHICH CONSTITUTES THE NUISANCE THE TAX LAW, INSTEAD OF BEING INCONSISTENT WITH THE LAW DECLARING THE ILLEGALITY, IS IN ENTIRE HARMONY WITH ITS GENERAL PURPOSE AND MAY SOMETIMES BE EVEN MORE EFFECTUAL. CERTAINLY WHATEVER DISCRIMINATIONS ARE MADE IN TAXATION

OUGHT TO BE IN THE DIRECTION OF MAKING THE HEAVIEST BURDENS FALL UPON THINGS WHICH ARE OBNOXIOUS TO THE PUBLIC INTERESTS WHEREVER THAT IS PRACTICABLE. (CAPITALS OURS.)

This is Judge Cooley speaking in the opinion in the Youngblood case and it will be observed that the hypothetical case given by Judge Cooley is identical in the instant case. The U. S. has prohibited the traffic throughout the nation and under Judge Cooley's reasoning has the right to tax the traffic under the Revenue laws.

Following this last expression of Judge Cooley one can come to no other conclusion than that the law instead of being inconsistent with the Prohibition Amendment is in entire harmony with it and, it tends to effect the same purpose, namely, the prevention of the sale of liquor.

This view is also in accord with that of Judge Minshall on p. 561 in Alder v. Whitbeck, 44 O. St. Supra, where he speaks of the tax as being an impediment to or disapproval of the traffic in liquors.

The last syllabus in Youngblood v. Sexton, 32 Mich. 406 supra, on this point is as follows:

> "A business is not necessarily licensed or protected because of its being taxed, nor does taxing a business imply an approval of it."
> See also pp. 420, 421, 422 and 423.

Judge Cooley also says on this phase of the question in his work on taxation, 3d ed. p. 14, as follows:

> "They privilege taxes—may be intended to discourage trades and occupations which may be useful and important when carried on by a few persons under stringent regulations, but exceedingly mischievous when thrown open to the general public and engaged in by many persons. An example is a

heavy tax imposed in some states, and in some localities in other states on those engaged in the manufacture and sale of intoxicating liquors."

On page 242 of the same work Judge Cooley further says:

"On the other hand, one purpose of taxation sometimes is to discourage a business and perhaps put it out of existence. Then it is taxation without any idea of protection attending the burden. This has been avowedly the purpose in the case of some federal taxes, while in others *the burden has been laid on subjects which by state legislation were put out of the protection of the law. The taxes have nevertheless been sustained.*" (Italics ours.)

In the license tax cases, 5 Wal. 462, cited in Conwell v. Sears, 65 O. St., supra, and Foster v. Speed, 120 Tenn. 470 supra, on p. 472, the Chief Justice rendering the opinion says as follows:

"Nor are we able to see the force of the other objection made in argument, that the dealings for which licenses are required being prohibited by the laws of the state cannot be taxed by the national government. There would be a great force in it if a license were regarded as giving authority, for then there would be direct conflict between national and state legislation on a subject which the Constitution places under the exclusive control of the states.

"But, as we have already said, these licenses give no authority. They are mere receipts for taxes. * * * * There is nothing hostile or contradictory, therefore, in the acts of Congress to the legislation of the states. What the latter prohibits, the former, if the business is found existing notwithstanding the Prohibition discourages by taxation. The two lines of legislation proceed in the same direction and tend to the same result. It would be judicial anomaly as singular as indefensible if we should hold violation of the laws of the Union."

In the case of Lyle v. Sears (61 N. E. 155), the court in part held:

> The assessment upon the traffic in intoxicating liquors required by section 43 64-9 of the Revised Statutes is legally and properly made upon that traffic, though it be carried on in violation of a municipal ordinance.

This case has been repeatedly affirmed by the Supreme Court of Ohio. Several attempts have been made since the passage of Prohibition Laws relating to municipalities, counties, and then to the entire State to reopen this question. The court has always been impressed with the reasoning of Judge Shauck, that wherever the traffic exists, the Government has the right to tax it. The fact that it exists in violation of law furnishes no reason why it should be immune from the burden of taxation. It is more costly and more troublesome than any other business, and, if it exists in violation of law and the taxing power can be used to carry out the purpose of the Government, it is not only consistent, but it furnishes an added reason why the Government should make this crime-producing traffic pay for some of the expenses that it causes.

Judge Shauck well said in the Ohio case:

> "We should not assume that the Legislature intended to offer a reward for the violation of local inhibitions in those numerous portions of the State where sentiment against the traffic is strong enough to secure their adoption, but conviction is not strong enough to secure their enforcement."

If a business could be exempt from taxation because it was operating in violation of the law, many trades might be willing in some sections of the country to take their

chances and operate in this manner in order to secure relief from tax laws.

The Congress well knew from its investigation of the beverage liquor traffic under Senate Resolution 307, (See copy of findings of Committee Sept. 5, 1919, Congressional Record. The investigation was made in 1918 and reported to the Senate) that in some places the law would not be rigidly enforced, because of the lawless character of the traffic. In order to make this outlawed trade bear some of the expense it makes, and in order to discourage the trade in such places, the liquor tax laws were retained, and those who were engaged in the trade in violation of the law were made subject to a special or prohibitive tax.

Over $22,000,000 in liquor taxes have been assessed this last year under authority of this Section 35. It has been a revenue and a law enforcement measure combined. As the Supreme Court of Tennessee well said, this tax has been more effective in preventing the traffic in some of these places than the criminal provisions of the law.

This has been the policy of the Government for years. A U. S. revenue tax has been collected on the illegal sale of liquor, and the collection of the tax gave the liquor dealer no right to sell. Section 1001-12 of the Revised Statutes enacted in 1919 provided a $1,000 tax on those who manufactured liquor in violation of State or Local Laws.

In the case of Foster v. Speed, 111 S. W. 925, the court held: a prohibited traffic may be taxed. The reasoning in this case is convincing:

> "The question in this case is whether the statute imposing a tax upon those engaged in that business applies to territory in which the sale of liquor is prohibited by what is commonly known as the "four-mile law." * * *

> "The imposition of a tax upon an outlawed business is often more efficient in suppressing it than statutes making it a criminal offense, because of the greater certainty of the collection of the tax and the difficulties attending to prosecution of the misdemeanor, and the fact that the enforcement of the two remedies is generally intrusted to different officers, as in this case, where the tax is collected by the clerk of the county court and the prosecution of the misdemeanor committed in making the sale made the duty of the sheriff and the district attorney."

In Carpenter v. State, 120 Tenn. 586 also we find this sound conclusion.

"The business of retailing liquors in any part of this state whether it be where they can be lawfully sold or where the sale is prohibited * * is made a privilege and taxed, and anyone engaging in this business although in violation of the latter law is liable for the tax."

In the case of Comm. v. Nickerson 128 N. E. 273, the Supreme Court of Massachusetts upheld the restrictive and prohibitory features of a license law after the 18th Amendment was adopted.

The court said:

> "But aside from that (referring to certain license provisions) other provisions of c. 100 aimed at the suppression of sales of liquor containing more than one per cent of alcohol have a tendency to enforce prohibition of the use of such liquor for beverage purposes. They will be enforced by judicial tribunals of a different sovereignty. They tend toward the same result by harmonious means."

It follows with even greater force that a tax or revenue law is valid, and in perfect harmony with the prohibition Act. The tax does not in any way give any legality to the trade and cannot be considered a protection to it. It is a burden on the traffic and often used as a means to discourage or prevent it.

FAILURE TO COMPLY WITH THE REVENUE LAWS IS AN INDICTABLE OFFENSE

The United States Liquor Tax or Revenue Laws have not been repealed by the enactment of the Volstead Act, as we have heretofore shown. It is contended, however, that, inasmuch as the Eighteenth Amendment and the Volstead Act prevent a liquor dealer from purchasing revenue stamps, or tax receipts, in advance for any illegal manufacture or sale of liquor, the Government has no legal right to prosecute the defendant for failing to do what the law prevents him from doing. The provision of the Volstead Act preventing the issuance of the stamps in advance has little if anything, to do with this question. This section 35 refers to the illegal manufacture or sale. Every person who makes liquor, or sells intoxicating liquor, must comply with certain provisions of the Revenue Laws, even though he makes such intoxicating liquor legally for non-beverage purposes. The failure of any individual to comply with these laws subjects the maker or seller to certain criminal penalties. As long as the law requires certain conditions precedent to be fulfilled before you can make or sell intoxicating liquor, the failure to comply with these conditions may be made an offense, such as is found in Sections 3257, 3279, 3281, 3282, R. S. et seq. If the defendant engages in either the legal or illegal liquor traffic, he is liable for the tax, and must obey certain revenue regulations. If he is to engage in a business not prohibited by the constitution, there is no reason why he should not comply with the Revenue Laws for the control of such business not prohibited.

It is somewhat similiar to the situation in the States which have license laws for, liquors not prohibited by the Federal Law. These States require every liquor dealer

who engages in the making and selling of any kind of malt and vinous liquors to secure a license. The Federal Act prohibits the sale and making of intoxicating liquor, containing ½ of 1 per cent alcohol for beverage purposes, but some of these State Laws require a dealer to take out a license for doing that which the Federal Act and the Eighteenth Amendment does not prohibit.

The Court of Appeals of Maryland, in passing upon this kind of a law, recently held in the case of Ulman v. Maryland (decided Jan. 13, 1921):

> "We have here to deal with the Federal Constitution and an Act of Congress which permit the sale of intoxicating liquor for non-*beverage* purposes, and a state law which prohibits the sale of such liquors without a license for *any* purpose. Certainly there is no conflict so far as the State law applies to sales for non-beverage purposes. Because it permitted the license of sales for beverage purposes also when such sales were not prohibited by the Federal Constitution, and because such licenses can no longer be issued, it does not follow that the whole law has been abrogated. On the contrary it is not unreasonable to suppose the Legislature would have enacted laws regulating the liquor business and providing for a revenue from such sales as would have been permissible if the 18th Amendment had then been in force. One of the ways of exercising control over the business by the State and preventing clandestine and illegal sales, would be to enforce the prohibition feature of the existing license laws, the effect of which would be to punish everyone selling without a license whether for beverage or non-beverage purposes. The inhibition being against *any sale* without a license; all sales are covered, both those permitted and those prohibited by the 18th Amendment. But even if it were probable that the Legislature of Maryland would not have enacted, the existing license laws or any part of them if it could have foreseen the adoption of the 18th Amendment that could

not be taken into consideration in determining the question now before us. Doubtless many statutes would not be enacted if happenings of the future could be foreseen.

"The Legislative intent which is important in reference to the dependence of the validity of one part of a statute upon the validity of another part, relates to conditions as they exist at the time of the passage of the statute and not to those brought about by subsequent events. If a statute is valid in all its parts at the time of enactment, then if conditions subsequently arise which make enforcement of part of the statute impossible, the question becomes, not what the men who made the law would have done if they could have looked into the future, but whether the remaining part of the statute can be enforced without doing violence to the purpose of the whole act; in other words any part of the purpose of the act can be subserved by the enforcement of such part of the statute as has not been nullified."

Section 3247 et seq. of the Revised Statutes relates to the tax on distilled liquors. By section 600, Act of Feb. 24, 1919, it is $2.20 per gallon on non-beverage spirits and $6.40 on beverage spirits. Every person who is a wholesale dealer in intoxicating liquor, manufacturers and wholesale dealers in fermented liquors, (Section 3244, R. S.) must pay a $100 tax.

(Section 18, Act of February 8, 1875 (18 Stat., 309), as amended by Sec. 4, of March 1, 1879 (20 Stat., 327), provides that retail dealers in liquors shall pay twenty-five dollars.

A manufacturer must give a bond in accordance with Title III of the Federal Prohibition Act, and sign an agreement under Regulation 1408 to be liable for all of the taxes. Any person who thus makes, or sells, or transports, intoxicating liquor in violation of the Revenue Laws, is as liable for the penalties provided in the crimi-

nal sections referred to as he was before the adoption of National Prohibition. Liability for failure to comply with the Revenue Laws relating to the legal manufacture of intoxicating liquors is the same today as it was before the adoption of National Prohibition.

In the case of United States v. One Essex Touring Automobile, 266 Fed. 138, the Court said:

> "This section (35) expressly continued the revenue laws in force and is not contrary to the Eighteenth Amendment. That amendment does not prohibit the manufacture, transportation, and sale of intoxicating liquors, for any purpose whatever, but only for beverage purposes. Such liquors may still be made, carried about, and sold for medicinal, sacramental, scientific, and some commercial purposes. The restraints applicable to liquors for such uses do not arise from the amendment, but are justified as reasonable safeguards to prevent the abuse of liberty as to them, and to attain enforcement of the prohibition for beverage purposes. Evidently there is much field left by the amendment for the operation of the revenue laws, which are preserved by section 35. Since that section expressly provides that taxation of illegal acts shall not be had in advance, and that the exaction of the tax afterwards shall not legalize them, there is no contravention, even in spirit, of the prohibitory amendment. The tax operates only as an additional penalty, and tends rather to the enforcement than the defeat of the prohibition scheme.
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> "It follows, then, that distilled liquors whether produced under permit for lawful purposes or in violation of law, are still "a commodity in respect whereof a tax is imposed," in the language of Rev. St. §3450, and its provisions are applicable to a case within them, unless defeated by inconsistent provisions of the Prohibition Act. The suggestion that repeal was intended because the whole subject of intoxicating liquors was covered is answered by the ex-

press language to the contrary in section 35. Section 26 is not only reconcilable with Rev. St. §3450, but applies to a substantially different subject-matter."

In the case of United States v. Turner, (265) Federal Rep. (249) the court discussed the effect of the Federal Amendment on various Revenue Laws and regulations in reference to section 3296. The Court said:

> "By far the commonest difficulty encountered by the government in prosecutions for removals of liquor under section 3296 is that of proving beyond reasonable doubt that the liquor was untaxed. A recognition of this difficulty and an intent to aid and supplement the old statute by the transporting clause of the Volstead Act seems to me to comport with the chief purpose of the framers of the Volstead Act much better than does an intent to repeal the removal clause of section 3296. Both statutes are useful in preventing the use of intoxicating liquor as a beverage. Neither fully covers the ground; but the two together seem to reach every method of evading the fundamental intent of the Volstead Act, in so far as the movement of liquor is concerned, and the use of intoxicating liquor as a beverage to any considerable extent necessitates movement of liquor."

In the case of United States v. Sohm, 265 F. 910, the Court held that the Internal Revenue laws were not repealed by the Prohibition Act. The Court said:

> "Before the Eighteenth Amendment, prohibiting manufacture of and traffic in "intoxicating liquors * * * for beverage purposes," * * * is an elaborate "code" of federal law governing manufacture of and traffic in distilled spirits and other intoxicating liquors for beverage and other purposes, in the main to provide public revenue. In so far as provisions of this Code apply to and sanction spirits and liquors for beverage purposes only, they are rendered obso-

lete or repealed by the Amendment. Subsequent to the amendment is the National Prohibition Act, to effectuate the amendment and also to govern manufacture and traffic in such spirits and liquors for non-beverage purposes: this latter not only as incidental to prohibition, but also to provide public revenue.

(1) In title 2, § 35, the act expressly provides that "all provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency, and the regulations herein provided for the manufacture or traffic in intoxicating liquors shall be construed as in addition to existing laws," and in section 9, title 3, the act recognizes the continued existence of many enumerated sections of the Codes, including sections 3258, 3260, and provides these sections shall not apply to industrial alcohol plants only, though the commissioner may so apply them by regulations made by him.

This express repeal in the act renders all rules of implied repeal inapplicable, demonstrates no implied repeal is intended. "Expressio unius," etc. See cases cited in 36 Cyc. 1081, and annual annotations.

(2) It follows that save for clear and unavoidable inconsistencies, both said Code and the act, wherein their terms are applicable to spirits and liquors for non-beverage purposes, are present law, the latter cumulative to the former, however cumbersome and confused the result may be.

It may be observed that, if the act more lightly penalizes an offense identical as in the Code, the latter is repealed by inconsistency.

(3) In the act is nothing forbidding, as does section 3282 of the Code, making a mash fit for the production of spirits on premises other than duly authorized distillery. Hence there is no inconsistency. Section 3282 is not repealed, and the first count of the indictment, based thereon, states a public offense.

It hardly needs to be pointed out that, subject to the act, distilleries will continue to exist and mashes to be made, and now, as before, it is essential the

latter be made only at the former duly authorized. The object of the act requires this as much as did the object of the Code."

(4-5) Section 3, title 2, of the act provides that intoxicating liquor for non-beverage purposes may be manufactured, etc., "only as herein provided." But "only as herein provided," by virtue of section 35, includes the provisions of all consistent existing law, to which the act is but an addition.

So, while said section 3 provides for permits from the commissioner and in form by him prescribed, and for bonds in his discretion and in form by him prescribed, section 3258 of the Code, requiring registration in statutory form with the collector of stills set up and possessed (upon which section is based the second count of the indictment), and section 3260 of the Code, requiring a bond in statutory form (upon which section is based the third count of the indictment), are not inconsistent with the act, are not repealed, and the said counts state public offenses."

In the Windham case, (264 Fed. 376) cited with approval by the court below, and in certain other cases, it was held substantially that, inasmuch as the Volstead Act prohibits the manufacture of distilled spirits for beverage purposes, and, by Title III thereof, provides a new system for the production of industrial alcohol, Section 3258 R. S., and other sections, must be regarded as having nothing left to operate upon, as being, therefore, inconsistent with the Volstead Act and consequently impliedly repealed.

This reasoning would have some weight if Title III covered the production of all non-beverage spirits. The fact is, however, that it covers only alcohol. It does not cover the productions of the potable liquors—brandy, gin, rum, etc. for non-beverage purposes, which is still left to be covered by the old internal revenue system. If

the production of potable liquors for non-beverage purposes was intended to be covered by the old internal revenue system, of course, Sections 3257, 3279, 3281, 3282, R. S., which are a part of that system, must remain in effect.

This disposes of the objection to all cases where the defendant failed to comply with the Revenue Laws relating to the manufacture and sale and transportation of liquor for legal non-beverage use. We submit that such prosecutions lie also for the manufacture and sale of liquors for illegal purposes. It is a well settled policy in the States that a person who makes or sells liquor may be punished for these acts if he does so even illegally. The same person may be punished for making or selling liquor without first having obtained a license. There has never been any question but what the State had the power to lay a liquor tax upon the making and selling of liquor, whether it was done legally, or illegally. If the State may penalize a person who makes or sells liquor without first securing a license, by the same logic the same penalty may be placed upon a person who makes or sells liquor without paying the tax. The argument is even stronger, because the payment of the tax never has in any State, or in the Federal Government given the person who pays the tax any right to sell liquor in violation of any law—Local, State, or Federal.

Section 3243, R. S., provides that the payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law; nor shall

the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes.

McGuire v. Commonwealth, 3 Wall, 387; License Tax cases, 5 Id., 462; 6 Int. Rev. Rec., 36; affirmed in Pervear v. Commonwealth, 5 Wall. 475.

A special-tax stamp from the Federal Government, under the internal revenue act of Congress, is no bar to an indictment under a State law prohibiting the sale of intoxicating liquors. (Pervear v. Commonwealth, 5 Wall., 475.)

The court in the Windham case and in the court below entirely overlooked the fact that all of the revenue laws remain in full force and effect for the manufacture of distilled liquors for non-beverage purposes, and all of these revenue laws and regulations remain in full force and effect to control the manufacture of industrial alcohol except the sections heretofore mentioned in this brief. It would be an anomalous situation if the regulations controlling the manufacture and distribution of non-beverage liquors were repealed. It would put the illicit manufacture of these liquors at a premium, or, as the Supreme Court said in the Ohio case, it would act as a reward for the violation of Prohibition Laws in those communities where local public sentiment was not strong enough to secure the honest enforcement of the criminal laws. The fundamental error in these cases is that the court assumes that the revenue laws are inconsistent with the Prohibition Act. In order to reach this conclusion, the court must have assumed that these revenue tax laws are license laws, and that they attempt to legalize the sale and manufacture of liquor. This court many years ago made clear the fallacy of this position in the license cases cited supra.

REVENUE LAWS NOT REPEALED BY IMPLICATION

No principle of statutory construction is better settled than the principle that repeals by implication are not favored. The presumption is against them. To work a repeal by implication there must be something more than inconsistency in principle. The inconsistency must be such as to make it impossible for the statutes to exist together. "If both can exist, the repeal by implication will not be adjudged. Johnson v. Browne, 205 U. S. 309, 321; Osborne v. Nicholson, 13 Wallace 654, 662; Wood v. U. S. 16 Peters 342, 363; U. S. v. Gear, 3 Howard 120, 131 U. S. v. Tynon, 11 Wall. 88; Dist. of Col. v. Hutton, 143 U. S. 18; U. S. v. Claffin, 97 U. S. 546; There is no difficulty whatever about Sections 3257-3279, R. S. et. seq., and the Volstead Act existing together. They do not clash in any particular. The offenses which are made punishable by Section 3257, and these other sections in the Revenue Laws are not punishable at all under the Volstead Act. As already shown, the Volstead Act does not cover the entire field of non-beverage spirits production. That which it does not cover is covered by the Internal Revenue laws, including Section 3257 R. S. et. seq. If this section of the revenue laws and the Volstead Act cover different fields of non-beverage spirits production, they are not even inconsistent in principle. Of course, then, these sections are not repealed by the Volstead Act.

That Congress did not intend these revenue laws to be repealed is indicated by the direction in Section 35 of Title II of the Volstead Act; "All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor

shall be construed as in addition to existing laws," and by the further direction in Section 3 that "all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented." The intent of Congress is rendered still clearer by the fact that the industrial alcohol plants and bonded warehouses established under the provisions of Title III of the Volstead Act are exempt from the provisions of Section 3279 R. S. Under the rule that the mention of one excludes the other, it must logically follow that Congress, having expressly exempted industrial alcohol from Section 3279 as to the matters coming within Title III, it did not intend to repeal the sections named as to matters not within the scope of this Title. In the face of all this, the inconsistency should be very clear before Section 3279 R. S. should be held repealed by implication. It is in fact very clear that there is no inconsistency between them.

There is no constitutional provision interfering with the continued existence of Section 3279 R. S., or the other section in issue in this case. It is unconstitutional, of course, to punish a person twice for the same offense, but even in the face of this inhibition, it has been held that:

> "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt defendant from prosecution and punishment under the other."

Morey v. Commonwealth, 108 Mass. 433; Carter v. McClaughry, 183 U. S. 365, 395, 22 Sup. Ct. 181, 46 L. Ed. 236; Gravieres v. U. S., 230 U. S. 338, 31 Sup Ct. 421, 45 L. Ed. 489; Ebeling v. Morgan, 237 U. S. 625, 630, 631, 35 Sup. Ct. 710, 59 L. Ed. 1151; U. S. v. Turner, 266 Fed. 248. But the act, or rather failure to act,

which is an offense under Section 3257 R. S., is not punishable at all under the Volstead Act. No offense which the Volstead Act creates is like that created by Sections 3257, 3281 or 3282 R. S. To hold that one repeals the other is like holding a statute dealing with the crime of burglary repeals one dealing with the crime of murder.

Persons who engage in the sale of alcoholic liquor, even though such business is a violation of the law of their State, are nevertheless required to pay special tax under the internal revenue laws of the United States. The stamp, however, issued to them is not a license, and does not protect them from prosecution, conviction and sentence under the State Law. (T. D. 21851; see also T. D. 1484 and T. D. 1826.)

It is true that the revenue stamps cannot be issued in advance for the illegal sale, but this does not relieve the liquor dealer from paying the tax, which he owes to the Government, when he makes or sells the liquor. The only part of the procedure which is changed by Section 35 of the Volstead Act is that the stamps cannot be issued in advance. This was provided in order to deny liquor dealers the imaginary protection which the revenue stamp gives when it is placed upon a liquor container. If a liquor dealer went to the Revenue Office and tendered the amount of the tax upon certain liquors which he had made or sold and the Government refused to receive the tax, there would be some basis for the contention that he had complied with the law as far as he was able to do so. The situation is similar to that which the liquor dealers faced before National Prohibition. Under Section 3240 of the Revised Statutes of the United States made the fact that a dealer paid the Revenue tax prima facie evidence of sale, and a provision was made for securing a certified copy to be used in the criminal

court to convict the holder for violating the Criminal Laws. The denial of the right to receive the revenue stamp in advance does not relieve the illegal liquor dealer of his responsibility to pay the tax upon liquors when he does make or sell such liquors subject to tax. It is not sound reasoning, therefore, to say that, because a liquor dealer is prohibited from making or selling liquor, he cannot be prosecuted under a law which makes it an offense for him to engage in this business without having paid the tax imposed upon him by the Revenue Laws.

The Prohibition Act and the revenue laws supplement each other and work to a common end. What the criminal sections fail to completely prohibit, the tax sections discourage by a heavy tax. The payment of the tax gives no legal right to sell, but on the other hand is used as evidence to convict the offender for violating the sections making the act a crime.

The tax is collected just as the liquor taxes always have been collected. The penal sections and abatement proceedings are enforced as provided in the act.

The National Prohibition Act for good and valid reasons includes the criminal, equity and taxing power of the Government to carry out its expressed purpose "to prevent the use of intoxicating liquor as a beverage."

That Congress had the power to do this is no longer called into question. Inasmuch as the Congress has specifically retained all the revenue laws, we respectfully submit that the law should be construed as to carry out the purpose of the act, and therefore the decisions of the lower court should be reversed.

Respectfully submitted,

WAYNE B. WHEELER,

Amicus Curiae.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 523.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

BOZE YUGINOVICH AND COUSIN BOZE YUGINOVICH, DEFENDANTS IN ERROR.

REPLY BRIEF FOR DEFENDANTS IN ERROR.

The brief submitted by the Government and the brief submitted by the *"amicus curiæ"* entirely miss the point involved in this appeal.

The defendants are charged in the indictment with failure to pay the tax imposed by the internal revenue laws on the manufacture of intoxicating liquor; but whether this liquor was to be used for beverage or non-beverage purposes, the indictment does not state.

Both the Government and the *"amicus curiæ"* strenuously (and, we concede, rightly) contend that under certain sections of the National Prohibition Act intoxicating liquor may be lawfully manufactured for non-beverage purposes; and that such manufacture is a proper object for taxation (which we also concede); and that the amount of that tax, the method of its collection and the penalties for not paying it, all are prescribed in the internal revenue laws (which is the fact).

Whereupon the Government argues that the manufacture of all kinds of intoxicating liquor—whether for beverage or non-beverage purposes—is a violation of the internal revenue laws and may be punished under their provisions; entirely disregarding the fact that the manufacturing of intoxicating liquor for beverage purposes is prohibited by a constitutional provision and cannot possibly be a lawful and taxable occupation.

If these defendants were engaged in manufacturing intoxicating liquors for non-beverage purposes without paying the tax and complying with the other provisions of the Revenue Laws, they are guilty of the crime of not paying the tax imposed on that industry as well as failure to observe the other laws regulating that industry. But that crime is not charged in the indictment; for no mention is made therein as to whether the alleged distilling or the place where these acts are alleged to have been accomplished were any or either or all of them used or committed for the purpose of or in the act of distilling intoxicating liquor for non-beverage purposes. (Transcript of Record, pp. 3 and 4.)

If on the other hand they distilled this intoxicating liquor

or beverage purposes, and failed to pay the tax on it (even conceding the Government's contention that such a tax may be levied in spite of the Constitutional prohibition), a different crime was committed; a new and distinct criminal element aside from the non-payment of the tax was an integral part of the act and the indictment is bad in that either that criminal element nor that criminal act is charged.

> "With rare exceptions offences consist of more than one ingredient and in some cases of many, and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment or the indictment will be bad and may be quashed on motion." U. S. *v.* Cook, 17 Wall., at p. 174.

The Government cannot deny that there are now two distinct elements of criminality present in the unlawful manufacture of intoxicating liquor:

The one, the crime committed by the failure to pay the tax imposed upon the manufacture of intoxicating liquor for non-beverage purposes;

The other, the crime of manufacturing liquor for beverage purposes in contravention of the express constitutional and statutory prohibitions, whether the tax is paid or not.

> "It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This because the accused must be advised of the essential particulars of the charge against him and the court must be able to decide whether the property taken was such as was the subject of larceny." U. S. *v.*

Cruikshank, 92 U. S., pp. 557, 558; 22 Cyc., p. 295, par. 2, and cases there cited.

These defendants are charged in the indictment with failing to pay the tax imposed upon the business of distilling intoxicating liquor and with the failure to observe certain provisions of law applicable to that industry.

A complete answer to the indictment is that it does not charge a crime:

1st. Because it is not stated in the indictment whether the liquor alleged to have been distilled or manufactured was so distilled or manufactured for non-beverage or beverage purposes; and these defendants have the right to know for what specific crime they are being prosecuted.

2nd. Assuming, as the Government does assume, that they are being prosecuted for not paying a tax on the occupation of distilling intoxicating liquor for beverage purposes, it is respectfully submitted that the Congress cannot tax an occupation or industry the very existence of which is forbidden by the terms of the Constitution from which Congress derives the power to tax at all.

As well say that Congress could authorize by law the taking of private property without due process of law and then impose a tax upon this privilege of such an amount as to make it impossible for citizens to engage in the industry, because they could not pay the tax and make a profit on the business.

Or permit a State to quarter State troops on inhabitants in the District of Columbia or the Philippine Islands in times of peace and then impose a prohibitory tax on the privilege.

The Government and the *"amicus curiæ"* apply the rules

of law applicable to statutory construction in their argument to sustain the contention that the National Prohibition Act and the Internal Revenue laws are not inconsistent and that, therefore, the punitive provisions of the Internal Revenue laws may be invoked to punish a person who violates the provisions of the National Prohibition Act.

The logic is unsound and the cases relied upon to sustain it are clearly distinguishable and do not apply to this situation.

Youngblood *v.* Sexton, 32 Mich., 406, cited at page 8 of the Government's brief, and page 6 of the brief submitted by the *"amicus curiæ"* was a case wherein the act, subject to the tax, was forbidden by statute—that is, it was an act *"malum prohibitum"* and not *"malum in se."*

The situation is exactly the same in the cases of Foster *v.* Speed, 120 Term., 470 (cited Govt. Brief, p. 17); Conwell *v.* Sears, 65 Ohio State, 49 (cited Govt. Brief, p. 8), and in every other case cited.

They are "local option" cases—the question of constitutional prohibition does not enter into the situations therein considered at all.

The language of section 35 of the National Prohibition Act is not conclusive on the question of the repeal or implied repeal of the Internal Revenue laws.

That question is purely judicial and not legislative; and the legislative branch of the Government cannot interfere with nor restrict by the language of the statute in question the judicial branch in interpreting and declaring what the law is or has been.

Ogden *v.* Blackledge, 2 Cranch, 272, p. 277.

Kosh Konong *v.* Burton, 104 U. S., 668, p. 678.

There is a fundamental difference between a constitutional limitation upon the power of a legislature and a constitutional inhibition upon that power.

We earnestly contend that the 18th Amendment to the Constitution of the United States takes away from Congress the power to tax the distillation of intoxicating liquors for beverage purposes.

Such being the case the Congress cannot enact nor the Executive continue to enforce laws which will punish a defendant for not paying a tax the Congress has no right to levy and we respectfully submit that the judgment of the lower court should be affirmed.

All of which is respectfully submitted.

RANSOM HOOKER GILLETT,
Of Counsel.